

Internal Revenue Service

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Corporation =

Plan =

Date X =

Date Y =

X =

Y =

Dear :

This letter responds to a letter dated February 20, 2009, and subsequent correspondence, submitted by your authorized representatives, requesting a ruling under section 162(m) of the Internal Revenue Code ("Code"). Specifically, a ruling is requested that the ability to designate the actual number of cash performance units ("CPUs") granted under the Plan to a covered employee after the first 90 days of the performance period will not prevent compensation paid under the Plan from qualifying as "performance-based compensation" under section 162(m)(4)(C) of the Code and section 1.162-27(e) of the Income Tax Regulations ("Regulations"). Corporation represents the following facts.

Corporation established the Plan to provide additional incentives for certain executives of Corporation, including "covered employees" within the meaning of section 162(m)(3) of the Code. Corporation's Board of Directors adopted the Plan on Date X. On Date Y, the shareholders approved the material terms of the performance goals under the Plan in a shareholder vote meeting the requirements of section 1.162-27(e)(4) of the Regulations.

The Plan provides compensation in the form of a cash bonus based on Corporation's financial performance in performance metrics set forth in the Plan over a designated performance period of not less than X fiscal years. Awards under the Plan are made in the form of CPUs. Each CPU is granted with a fixed dollar value and the payment amount for each CPU is the function of a formula based on the performance of Corporation with respect to one or more performance goals. The Compensation Committee, which is composed of two or more outside directors within the meaning of section 1.162-27(e)(3) of the Regulations, may grant CPUs under the Plan to certain designated eligible participants, including covered employees.

The Plan provides a maximum limitation on the dollar amount of an award that may be paid to a covered employee for any performance period. Under the terms of the Plan, the dollar amount payable to a covered employee may not in any event exceed Y percent of Corporation's earnings before income taxes, as publicly disclosed in Corporation's annual report to the Securities Exchange Commission on Form 10-K for the fiscal year ended immediately prior to the applicable payment date. The shareholders approved this maximum award on Date Y.

Within the first 90 days of a performance period, the Plan requires the Compensation Committee to establish (a) the period over which the performance goals will be measured; (b) the award payment date; (c) the performance goals applicable to each participant; (d) the method for evaluating performance; (e) the unit value for each CPU; (f) the method for determining the payment amount for each participant; and (g) the maximum number of CPUs that may be granted to any one participant. With respect to executives designated to participate in the Plan for a performance period, the Compensation Committee may delay the grant of a specific number of CPUs to each participant until after the first 90 days of the performance period. The Plan gives the Compensation Committee discretion to grant an individual participant the maximum number of CPUs that may be granted to any one participant or some reduced number of CPUs. Corporation represents that if a participant receives less than the maximum number of CPUs, the number of CPUs issued to other participants will not be increased as a result.

After the end of each performance period, the Compensation Committee will certify, in writing, the level of performance achieved by Corporation with respect to each relevant performance goal, the payment amount with respect to each CPU, and the amount to be received by each participant, including the covered employees, for the relevant performance period.

Section 162(a)(1) of the Code provides that a taxpayer may deduct all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries and other compensation for personal services actually rendered.

Section 162(m)(1) of the Code provides that a publicly held corporation shall not be allowed a deduction for remuneration with respect to any covered employee to the extent that the amount of such remuneration for the taxable year exceeds \$1,000,000.

Section 162(m)(4)(C) of the Code excepts from this limitation certain “performance-based compensation” payable solely on account of the attainment of one or more performance goals, but only if (i) the performance goals are determined by the compensation committee of the board of directors of the taxpayer which is comprised solely of two or more outside directors; (ii) the material terms under which the remuneration is to be paid, including the performance goals, are disclosed to the shareholders and approved by a majority of the vote in a separate shareholder vote before the payment of such remuneration; and (iii) before any payment of such remuneration, the compensation committee of the board of directors certifies that the performance goals and any other material terms were satisfied.

Section 1.162-27(e)(1) of the Regulations provides that the \$1,000,000 deduction limit does not apply to qualified performance-based compensation. Qualified performance-based compensation is compensation that meets all of the requirements set forth in sections 1.162-27(e)(2) through (5) of the Regulations.

Under section 1.162-27(e)(2)(i) of the Regulations, qualified performance-based compensation must be paid solely on account of the attainment of one or more preestablished, objective performance goals. A performance goal is considered preestablished if it is established in writing by the compensation committee not later than 90 days after the commencement of the period of service to which the performance goal relates, provided that the outcome is substantially uncertain at the time the compensation committee actually established the goal. The Regulations further provide that a performance goal is objective if a third party having knowledge of the relevant facts could determine if the goal is met.

Section 1.162-27(e)(2)(ii) of the Regulations provides that a preestablished performance goal must state, in terms of an objective formula or standard, the method for computing the amount of compensation payable to the employee if the goal is attained. A formula or standard is objective if a third party having knowledge of the relevant performance results could calculate the amount to be paid to the employee. In addition, a formula or standard must specify the individual employees or class of employees to which it applies.

Under section 1.162-27(e)(2)(iii)(A) of the Regulations, the terms of an objective formula or standard must preclude discretion to increase the amount of compensation payable that would otherwise be due upon attainment of the goal. A performance goal is not discretionary merely because the compensation committee reduces or eliminates the compensation or other economic benefit that was due upon attainment of the goal.

However, the exercise of negative discretion with respect to one employee is not permitted to result in an increase in the amount payable to another employee.

Based on the information submitted, we rule that the ability to designate the actual number of CPUs granted under the Plan to a covered employee after the first 90 days of the performance period will not prevent compensation paid under the Plan from qualifying as “performance-based compensation” under section 162(m)(4)(C) of the Code and section 1.162-27(e) of the Regulations. No opinion is expressed as to whether compensation paid under the Plan will otherwise qualify as “performance-based compensation” under section 162(m)(4)(C) of the Code and section 1.162-27(e) of the Regulations.

Except as specifically ruled on above, no opinion is expressed as to the Federal tax consequences of the transaction described above under any other provision of the Code. This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. Taxpayer should attach a copy of this ruling to any income tax return to which it is relevant.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

THOMAS D. SCHOLZ
Assistant Branch Chief
Executive Compensation Branch
Office of the Division Counsel/Associate Chief
Counsel (Tax Exempt and Government Entities)